INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Pertinent regulations and rules	2
Statement	3
Argument	4
Conclusion	9

CITATIONS

Cases:	
Aetna Life Ins. Co. v. *Kepler*, 116 F. (2d) 1	4
Berry v. *United States*, 312 U. S. 450	8, 9
Dooley v. *Pease*, 180 U. S. 126	5
Gates v. *General Casualty Co. of America*, 120 F. (2d) 925	5
Hoskins v. *United States*, 100 F. (2d) 343	8
Lumbra v. *United States*, 290 U. S. 551	8, 9
McDaniel v. *United States*, 108 F. (2d) 450	4
Manning v. *Gagne*, 108 F. (2d) 718	4
Miller v. *United States*, 294 U. S. 435	8
O'Quinn v. *United States*, 70 F. (2d) 599	8
Proechel v. *United States*, 59 F. (2d) 648	8
Stanley v. *Supervisors of Albany*, 121 U. S. 535	5
United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386	5
United States v. *Luckinbill*, 65 F. (2d) 1000	8
Miscellaneous:	
Bulletin No. 1, Treasury Department (Regulations and Procedure, U. S. Veterans' Bureau, Vol. II, pp. 1233–1237)	2
Treasury Decision No. 20 (Regulations and Procedure, United States Veterans' Bureau, Vol. I, p. 9)	2
Rule 52 (a) Federal Rules of Civil Procedure	2, 3, 4

420415—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 606

CARROLL O. STILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION TO PROCEED ON A TYPEWRITTEN RECORD AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, rendered as a part of its findings of fact and conclusions of law (R. 65–73), is not reported. The opinion of the circuit court of appeals (R. 82–93) is reported in 120 F. (2d) 876.

JURISDICTION

The judgment of the circuit court of appeals was entered July 11, 1941 (R. 94). The petition for a writ of certiorari was filed September 11, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the finding of the district court that the petitioner was totally and permanently disabled while his war risk term insurance remained in effect was clearly erroneous within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

PERTINENT REGULATIONS AND RULES

The contract sued on was in the form of a regulation promulgated on October 15, 1917 (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237), which was issued pursuant to statutory authorization (c. 105, sec. 402, 40 Stat. 409); it provided, so far as here pertinent, for payment to the insured of monthly benefits at the rate of $5.75 for each $1,000 of insurance, in the event he became totally and permanently disabled while the insurance was in force.

By regulation issued on March 9, 1918 (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. 1, p. 9), total and permanent disability was defined as:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially

> gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *.

Rule 52 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States provides in part:

> In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Supplement to Brief for Appellant filed in the court below is also filed herewith as a supplement to this brief because it includes the pertinent portions of the exhibits, none of which have as yet been furnished to this Court by the circuit court of appeals.[1]

STATEMENT

This suit was brought October 3, 1936, by the petitioner, Carroll O. Still, to recover total perma-

[1] References to this supplement are herein preceded by the symbol "S."; references to the typewritten record are preceded by the symbol "R."

nent disability benefits under a $10,000 contract of war-risk term insurance issued to him during his naval service from May 10, 1917, to December 12, 1918 (R. 2–4).

The case was tried without a jury on the sole issue whether the petitioner was totally and permanently disabled on June 30, 1927, the date on which his insurance expired for nonpayment of premiums (R. 65). At the conclusion of the evidence, the district court entered findings of fact (R. 65–71) and conclusions of law (R. 71–73) to the effect that the petitioner was totally and permanently disabled from heart trouble on the controlling date. On appeal by the Government (R. 76) from judgment for the petitioner (R. 74–75), the court below reversed (R. 94), holding in effect (R. 82–93) that the finding and conclusions of the trial court were "clearly erroneous" within the meaning of Rule 52 (a) of the Rules of Civil Procedure.

ARGUMENT

1. In reviewing the evidence in order to determine whether the findings of the trial court were "clearly against the weight of the evidence" (R. 85), the court below properly did not exceed the well-established scope of appellate reexamination prescribed by Rule 52 (a) of the Federal Rules of Civil Procedure. *Aetna Life Ins. Co.* v. *Kepler,* 116 F. (2d) 1, 4–5 (C. C. A. 8); *McDaniel* v. *United States,* 108 F. (2d) 450, 452 (C. C. A. 7); *Manning* v. *Gagne,* 108 F. (2d) 718, 720–721 (C. C.

A. 1); *Gates* v. *General Casualty Co. of America*, 120 F. (2d) 925, 929 (C. C. A. 9).[2]

2. The court below held that the finding of the trial court that petitioner had sustained the burden of proving his total permanent disability on June 30, 1927, was plainly in error and unsupported by substantial evidence. A review of the pertinent evidence amply justifies this conclusion of the court below.

The petitioner, prior to entering the naval service in 1917, attended high school and college (S. 47) and had been employed as an automobile mechanic and general utility man (R. 9). He was an instructor at an airfield while in the Navy (S. 48). After his discharge from the service on December 12, 1918, he was a traveling salesman for the same employer for whom he had previously worked (R. 9–10); later petitioner was associated with other automobile agencies (R. 28). From August 1, 1924 to June 30, 1928 he was employed by the Kelly-Springfield Tire Company as a traveling salesman (R. 32, S. 45–46), and after selling automobiles on commission for two or three months (R. 25, 29), was employed by the Fisk Tire Company as a traveling salesman from March 16, 1929, to Febru-

[2] *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, *Dooley* v. *Pease*, 180 U. S. 126, and *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, cited by petitioner as in conflict (Pet. 5–6, 7) were rendered prior to the effective date of the Federal Rules of Civil Procedure, and, in any event, do not in fact appear to prescribe a different scope of review than that observed by the court below.

ary 14, 1930 (R. 32, S. 47–48). His employment at both of the tire companies was on a salary basis with traveling expenses in addition (R. 32, S. 45–46, 47). Late in 1930 he engaged in the drug business for four or five months (R. 16, 18–19). He engaged in no business or work thereafter.

There was testimony on petitioner's behalf that since he had left the naval service he had suffered at times from severe migraine headaches, nausea and pain in the chest (R. 25, 27, 28), and that he had suffered a spell of unconsciousness in 1926 under circumstances not disclosed by the evidence (R. 7–9, 23, 30). The reports of numerous examinations of petitioner by Government physicians (S. 48–72), however, disclose no mention by the petitioner to the examining physicians of any of these complaints until February 24, 1931, when petitioner for the first time complained of headaches[3] (S. 53, 55). There were no complaints of pain in the abdomen until July 1931 (S. 57) and none concerning nausea until 1932 (S. 61).[4]

The petitioner was paid his full salary throughout his employment with the tire companies (R. 32, S. 45–46).

---

[3] Four of the reports were made prior to June 30, 1927, and one on July 12, 1927 (S. 51–52). The complaints in the reports prior to February 1931 were limited to the condition of petitioner's teeth and feet (R. 48, 50, 51).

[4] Petitioner maintained on cross-examination that the physician who made the first four examinations "knew" of his headaches (R. 30). He did not, however, suggest any reason for their omission from the reports.

The petitioner relies (Pet. 8) upon the opinion expressed by his medical witness, Dr. Bruce, that if the petitioner had "this heart condition" while working for a tire company, the witness did not think that the condition was "helped" by the work (R. 38–39). But such testimony can hardly be regarded as an expression of opinion that even the strenuous work of a traveling salesman in which the petitioner was engaged at the time in question would substantially injure his health. In any event, the witness assumed the existence of a heart condition during that period, and we submit that, as held in effect by the court below (R. 92), there was no substantial evidence that such a condition existed at that time. The Government's medical testimony was to the effect that the heart condition was only in its initial stage as late as December 1930 (R. 47–48, 56–58). The opinion of Dr. Bruce, on which the petitioner also relies (Pet. 8), that he had a heart attack on the occasion when he became unconscious in 1926 (R. 38–39) was lacking in probative value, because the witness was asked to assume material facts of which there was no evidence; i. e., that the petitioner at the time of the attack had "pains in his abdomen" and "severe headaches" [5] (R. 38–39).

[5] While it is true that petitioner testified that he had "severe migraine, nausea, and pain in the chest" at times since he had left the naval service (R. 25, 27, 28), nothing in the record shows that he was so suffering at the particular time when he became unconscious.

It is significant, moreover, that prior to December 1930, the petitioner made no claim for disability insurance benefits either from the Government or from a private insurance company (R. 30, 33) and did not spend any time in a hospital except for the three-day period in 1926 when he became unconscious under circumstances not disclosed by the evidence.

Even if it were to be assumed that the petitioner's condition disabled him from engaging in the occupation of a traveling salesman, that fact alone would not constitute substantial evidence of total disability within the meaning of the insurance contract. The burden was upon him to show further that he was unable to engage in any other substantially gainful occupation of a less strenuous nature for which he was qualified or for which he could qualify himself by a reasonable amount of study and training. *Lumbra* v. *United States,* 290 U. S. 551, 559; *Miller* v. *United States,* 294 U. S. 435, 441; *Berry* v. *United States,* 312 U. S. 450, 455; *Proechel* v. *United States,* 59 F. (2d) 648, 649–650 (C. C. A. 8); *United States* v. *Luckinbill,* 65 F. (2d) 1000 (C. C. A. 10); *O'Quinn* v. *United States,* 70 F. (2d) 599 (C. C. A. 5); *Hoskins* v. *United States,* 100 F. (2d) 343, 344–345 (C. C. A. 5). It seems clear that petitioner was qualified at least as late as June 30, 1927, to engage in many of such

occupations or could have been readily trained to do so.[6]

CONCLUSION

The decision of the court below is correct and involves no conflict. The case turns on its own facts. We respectfully submit that the petition should be denied.

CHARLES FAHY,
Acting Solicitor General.
JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
FENDALL MARBURY,
RICHARD S. SALANT,
Attorneys.

OCTOBER 1941.

---

[6] In the course of its opinion, the court below stated that to support a finding of total permanent disability, the claimant must "show a determined, though unsuccessful, effort to attempt substantially gainful employment which is reasonably suitable for one suffering from the claimed impairment." Petitioner urges that this "rule of law" is in error and in conflict with *Berry* v. *United States*, 312 U. S. 450. But we do not understand that the decision of the court below hinged upon this statement, since the court considered all relevant factors and expressly held that the mere fact that petitioner continued to work did not negative a finding of total permanent disability. Contrary to petitioner's suggestion (Pet. 15), the court's statement was intended to be limited to claimants who could work without injury to their health. In any event, the *Berry* case is clearly distinguishable on its facts. Clearly there are no fixed formulae for determining the existence of total permanent disability; the question is peculiarly one turning on the circumstances of each case. *Lumbra* v. *United States*, 290 U. S. 551, 558–559.

U. S. GOVERNMENT PRINTING OFFICE: 1941